

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CESAR ARIAS,

Plaintiff,

- against -

STONHARD, INC. ,

Defendant.

Civil Action No.  
08 Civ. 3286

(Marrero, J.)

ANSWER

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Defendant STONCOR GROUP, INC. (sued herein as “Stonhard Inc.” and hereinafter referred to as “StonCor”), by its attorneys, Herzfeld & Rubin, P.C., 40 Wall Street, New York, New York 10005, as and for its Answer to plaintiff’s Complaint, alleges upon information and belief, as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs “1”, “3”, “4”, “6”, “7” of the Complaint.
2. Denies each and every allegation contained in paragraph “2” of the Complaint, except states that StonCor is a foreign corporation duly authorized to conduct business in the State of New York.
3. Denies each and every allegation contained in paragraphs “5”, “8”, “9” and “10” of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

4. The Complaint fails to state a claim as against StonCor.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

5. To the extent that the product which is the subject of this action was sold, delivered and accepted for commercial and industrial use under agreements which excluded warranties and limited the buyer's remedies, StonCor cannot be liable herein.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

6. That at all times mentioned in the Complaint, StonCor was not in privity with plaintiff. Therefore, the Complaint is barred in whole or in part.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

7. That the product which is the subject of this action was misused and/or not used properly or for its intended purpose by plaintiff and/or others over whom StonCor neither had control nor exercised any control.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

8. That the plaintiff assumed the risks, if any, associated with the use of the product which is the subject of this action.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

9. That the damages alleged to have been sustained by plaintiff were caused by the negligence and other culpable conduct of plaintiff and others over whom defendant neither had nor exercised any control and without any negligence or other culpable conduct by defendant contributing thereto.

10. That the damages alleged to have been sustained by plaintiff was caused, in whole or in part, by plaintiff's and/or others' aforesaid misuse of the product, assumption of risk negligence and/or by other culpable conduct on plaintiff's part and/or others' part, and in the event damages are recovered by plaintiff, such damages shall by reason of the foregoing be diminished in the proportion which the culpable conduct attributable to plaintiff and/or others bears to the culpable conduct which caused the injuries and damages.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

11. Plaintiff's damages, if any, are and will be diminished and/or subrogated by any and all collateral source payments obtained in accordance with the provisions of CPLR 4545.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

12. If plaintiff sustained any injuries or damages as alleged, such injuries or damages were exacerbated by the plaintiff's failure to mitigate such injuries or damages.

**AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

13. If plaintiff sustained any damages, StonCor's liability, if any, is limited by CPLR 1601, *et seq.*

**AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

14. Plaintiffs' complaint is legally defective as against StonCor.

**AS AND FOR A ELEVENTH AFFIRMATIVE DEFENSE**

15. Plaintiffs' Amended Complaint is barred by the applicable statute of limitations.

**AS AND FOR A TWELTH AFFIRMATIVE DEFENSE**

16. Plaintiffs' Amended Complaint is barred by virtue of the doctrines of res judicata and/or collateral estoppel.

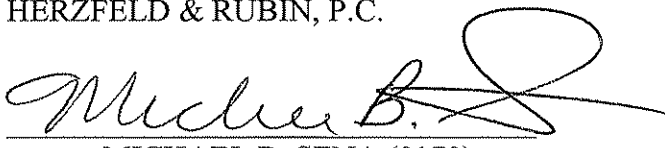
**AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE**

17. To the extent that the subject product was substantially altered or modified after it left the possession, custody and/or control of StonCor, then StonCor cannot be liable to the plaintiff.

WHEREFORE, it is respectfully submitted that plaintiff's complaint should be dismissed as against StonCor, with costs, disbursements and attorneys fees awarded.

Dated: New York, New York  
April 28, 2008

HERZFELD & RUBIN, P.C.

By   
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